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IN THE

Supreme Court of the United States

October Term, 1958

No. 887

WEBSTER ROSEWOOD CORPORATION,

Petitioner,

vs.

SCHINE CHAIN THEATRES, INC., SCHINE THEATRICAL COMPANY, SCHINE CIRCUIT, INC., SCHINE LEXINGTON CORPORATION, J. MEYER SCHINE, LOUIS W. SCHINE and JOHN A. MAY,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the United States District Court for the Western District of New York, containing the Trial Court's Findings of Fact and Conclusions of Law is printed in Appendix A annexed to the petition and reported in 157 F. Supp. 251 (N. D. N. Y. 1957). The opinion of affirmance of the Court of Appeals is printed in Appendix A to the petition and reported in 263 F. 2d 533 (2d Cir. 1959).

Jurisdiction

The judgment of the Court of Appeals was entered on February 13, 1959 and the petition for certiorari was filed on May 4, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

The only question presented by this petition is whether two findings of fact of the Trial Court which were unanimously affirmed by the Court of Appeals were clearly erroneous. The Trial Court found that the evidence in this private civil antitrust case did not sustain the claim of the complaint that the defendants had conspired to monopolize motion pictures between 1942 and 1950 and thereby deprive plaintiff of the first neighborhood run, and further found that all of the evidence in the case rebutted any presumption or inference of the continuance during the period between 1942 and 1950 of the conspiracy of which defendants had been found guilty in a previous civil antitrust suit instituted by the government.

Statement

This is a private civil action under the Federal Antitrust Laws instituted by the owner and operator of a neighborhood theater in the City of Rochester, New York, against the owners and operators of a competing theater. It involves the now familiar dispute over which of two theaters in a particular urban neighborhood should receive the first run of motion pictures in the neighborhood and the period in controversy extends from June 20, 1942, the date the plaintiff acquired the operation of the theaters, to May 10, 1950, the date of the institution of the action.

Upon the trial of the action, plaintiff relied entirely on decree against the defendants in a previous government antitrust action for proof of the charges of conspiracy and monopolization upon which the claim was predicated. The defendants adduced a mass of testimony from disinterested witnesses to the effect that their theater was superior in all respects, and this testimony was accepted by the Trial Court.

The plaintiff closed its case without making any attempt to prove that it had ever sought a first neighborhood run of pictures during the period involved in the lawsuit. When this lack of proof became apparent upon the motions to dismiss, the Trial Court permitted the plaintiff to reopen its case for the purpose of supplying evidence to this effect but the Trial Court rejected this evidence because of the many inconsistencies in the testimony offered by the plaintiff and the direct contradictory evidence offered by the defendants.

The opinion of the Trial Court contains a painstaking analysis of all the evidence in the case and treats at length the questions of law that were raised upon the trial of the action. As the Court points out, the most turbulent issue in the lawsuit involved the treatment to be accorded the previous decree in United States v. Schine Chain Theatres, Inc., because without it the plaintiff's case was left hanging in midair and even the counsel for the plaintiff stated that it was "sketchy" and he was not even too positive he had a case without the decree.

In its opinion, the Court overruled the defendant's objections and received the decree as *prima facie* evidence of the conspiracy covering the Rochester area in relation to the first neighborhood run. The Court properly limited the ap-

plication of the decree to the time period involved in the previous government litigation which was the subject of a specific finding in the government case. This temporal limitation is assigned as error and forms the chief burden of the petition herein.

Although the Trial Court's treatment of the decree is unassailable as a matter of law, the ultimate disposition of the case is not predicated on a ruling that the effect of the decree is limited as to the time element. The Court went on to find as a matter of fact that even if the *prima facie* impact of the decree was stretched beyond the period involved in the government case and carried forward to the date of the institution of this action, the evidentiary effect accorded the decree by Section 5 of the Clayton Act was rebutted and overcome by all the evidence in the case and particularly the conduct of the parties and the circumstances surrounding the operation of the theatres (P. 20, 25). This finding was affirmed by the Court of Appeals P. 30).

Petitioner's other assignment of error is equally untenable. As noted above, the petitioner closed its case without offering any proof that it had ever requested the distribution of motion pictures to license films for exhibition on the first neighborhood run. The case was reopened and the testimony offered by the plaintiff was regarded by the Court as "hazy, casual and not too persuasive" (P. 23). The defendants offered direct evidence disputing this testimony. The Court found as a fact that there was no demand or request upon the part of the plaintiff for first neighborhood run and the plaintiff was willing and content to follow the defendants' theater and pay lower

"P." refers to the Petition for Writ of Certiorari.

film rentals (P. 25). This finding was also affirmed by the Court of Appeals (P. 81).

Upon the basis of this finding, the Trial Court would have been entirely justified in dismissing the complaint as a matter of law. The Court did not, however, dispose of the case on this narrow ground but considered the lack of a demand as further proof that the plaintiff accepted the existing arrangement of neighborhood runs without protest, a circumstance which strongly rebutted any inference of conspiracy (P. 24).

ARGUMENT

This petition presents no question of law since the determination of the Trial Court was based squarely on findings of fact. These findings effectively dispose of the claim asserted in the complaint even if the previous decree is accorded the unlimited temporal scope advocated by the petitioner and no legal effect is attributed to the absence of a demand upon the part of the petitioner for the first neighborhood run of motion pictures. Since these findings were sustained by the Court of Appeals and there is no attempt to demonstrate clear error, this Court will not seek to review the determination herein. *Pick Manufacturing Co. v. General Motors Corp.*, 299 U. S. 3 (1936).

Petitioner's First Question

Although not determinative of the case, the Trial Court's treatment of the previous government decree correctly applied Section 5 of the Clayton Act to the facts found. In *U. S. v. Schine Chain Theatres, Inc.*, the Trial Court made the following finding of fact:

> "All findings made herein with respect to any acts committed by the defendants or any of them, or any

course of conduct pursued by them which the Court holds to be in violation of the antitrust laws are limited to acts committed or course of conduct pursued prior to May 19, 1942, plaintiff's counsel having stated at the opening of the trial that he would not offer evidence beyond that date" (P. 19).

The *Schine* decree was admissible solely by virtue of the provisions of Section 5 of the Clayton Act which limits the applicability of a prior decree to matters respecting which the decree would be an estoppel between the parties. Following *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537 (1954), the Trial Court admitted the decree as *prima facie* evidence of a conspiracy in the Rochester area existing during the period involved in the government case. The Court of Appeals held that "There can be no doubt that this was a proper interpretation of the statute" (P. 29).

Moreover, any possible inference of a continuance of the conspiracy is dispelled by the further circumstance that on May 19, 1942 an order *pendente lite* was entered in the government litigation which effectively restrained the conduct of the defendants during the period involved in this case.

Petitioner makes reference in its argument to contempt proceedings subsequently instituted against these defendants for violation of the *Schine* decree. *U. S. v. Schine*, 260 F. 2d 552 (2d Cir. 1958) *cert. den.* 358 U. S. 934 (1959). This proceeding involved the failure of the defendants to effect a divestiture of its theatres and in fact the defendants were found blameless of the "trade practice charges" that form the basis of the complaint herein.

Petitioner's Second Question

As noted above, the Court found as a fact that the plaintiff made no demand or request for the first neighborhood run of motion pictures, but did not regard this circumstance as determinative (P. 24). Nonetheless petitioner seeks to review here the well-established rule of the case law that such a demand is a necessary condition of a claim for relief. *Milwaukee Towne Corp. v. Loews, Inc.*, 190 F. 2d 561 (7th Cir. 1951), *J. J. Theatres, Inc. v. Twentieth-Century Fox Film Corp.*, 212 F. 2d 840 (2d Cir. 1954).

Petitioner would distinguish the instant case since the parties defendant are exhibitors while in the cases cited above, the defendants were distributors and exhibitors. Neither reason nor logic is advanced in support of this distinction. Since the claim is predicated on the same wrong, to wit a conspiracy between distributors and exhibitors, the character of the parties defendant is wholly immaterial with respect to the necessity of a showing that the plaintiff took some steps to obtain the product which he claims was denied him by virtue of the conspiracy.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

JAMES O. MOORE, JR.,
Attorney for Respondents.

RAICHLE, TUCKER AND MOORE,
Of Counsel.

May 26, 1959.